



IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE SOUTHERN DISTRICT OF TEXAS
 HOUSTON DIVISION

ENTERED
 12/27/2011

IN RE)
 KATIE VASSER,) CASE NO. 11-33096-H3-7
 Debtor,)
 JANET S. NORTHRUP, TRUSTEE,)
 Plaintiff,)
 v.) ADV. NO. 11-3411
 KATIE VASSER,)
 Defendant.)

MEMORANDUM OPINION

The court has held a hearing on its Order to Show Cause (Docket No. 17) directed to Samuel Milledge, the attorney for the Defendant in the above captioned adversary proceeding, as to why he should not disgorge his attorney fees and why he should not be sanctioned for failure to appear and properly represent Defendant. At the conclusion of the hearing, Plaintiff, through her counsel, orally moved for an award of sanctions payable to the estate. The court directed Plaintiff to make any such motion in writing. Plaintiff filed a motion, titled "Trustee's Written Submission After Show Cause Hearing" (Docket No. 21). The following are the Findings of Fact and Conclusions of Law of the court. A separate Judgment will be entered sanctioning Samuel Milledge. To the extent any of the Findings of Fact are

considered Conclusions of Law, they are adopted as such. To the extent any of the Conclusions of Law are considered Findings of Fact, they are adopted as such.

Findings of Fact

Katie Vasser ("Debtor" or "Defendant") filed a voluntary petition under Chapter 7 of the Bankruptcy Code on April 5, 2011. Janet S. Northrup ("Plaintiff") is the Chapter 7 Trustee.

On July 26, 2011, Plaintiff filed the complaint in the instant adversary proceeding. Plaintiff seeks denial of Debtor's discharge, asserting that Debtor knowingly and fraudulently made false statements in Debtor's schedules, statement of financial affairs, and an amended petition. The complaint contains eighteen paragraphs of factual allegations, including allegations of this court's jurisdiction, the identities of the parties, the propriety of service, and factual allegations addressing the substance of the claim on which Plaintiff seeks relief in the adversary proceeding. (Docket No. 1).

Plaintiff filed a return of service on July 28, 2011. Defendant failed to file a timely answer. On August 31, 2011, Plaintiff filed a motion for default judgment. (Docket No. 7).

On September 6, 2011, Defendant filed a document described in its title as an answer. (Docket No. 8). The answering paragraphs state, in full:

1. The allegations contained in Movant [sic] complaint are DENIED.
2. Debtor request [sic] that Movant's Complaint for Relief be Denied.

(Docket No. 8).

On September 9, 2011, Plaintiff's counsel served Defendant's counsel with a proposed motion for sanctions, stating that it would be filed on October 3, 2011 if corrective action was not taken.

On September 12, 2011, Plaintiff moved to strike Defendant's answer, on grounds it failed to comply with Rule 8 of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7008, requiring that general denials are permitted only if the answering party intends in good faith to deny all of the allegations of the complaint, including the jurisdictional grounds. (Docket No. 11).

On September 27, 2011, this court held an initial status conference in the above captioned adversary proceeding. Samuel Milledge, counsel for Defendant, failed to appear.

Defendant did not file a response addressing the substance either of the motion for default judgment or the motion to strike, but instead on October 3, 2011, filed an amended answer. In the amended answer, Defendant admitted the allegations of nine of the 18 paragraphs of the complaint, plus

one sub-paragraph, and denied the allegations of six paragraphs, plus one sub-paragraph.¹ (Docket No. 13).

On October 20, 2011, the court entered the instant Order to Show Cause. In the order, the court directed Milledge to show cause why he should not disgorge any attorney fee he has received in connection with the above captioned case, and why he should not be sanctioned, for his "failure to appear and properly represent Katie Vasser, Defendant." (Docket No. 17).

At the hearing on the instant Order to Show Cause, Milledge testified that he has not accepted any attorney fees with respect to this case. He testified that he failed to appear at the initial status conference because he was in a deposition and lost track of time.

After Milledge presented his testimony responsive to the Order to Show Cause, counsel for Plaintiff presented argument that Milledge should be sanctioned based on his failure to properly represent Debtor, by failing to file a timely answer, filing an answer that he knew or should have known was insufficient. Counsel for Plaintiff articulated an argument that Milledge should be sanctioned in the amount of at least \$4,025, payable to the estate, because Trustee was required to file a

¹The two remaining paragraphs, paragraphs 14 and 16 of the complaint, set forth statutory language, and do not require a response.

motion for default judgment and a motion to strike. The court directed Plaintiff to submit its motion in written form.

Milledge was given an opportunity to respond to Trustee's argument at the hearing, and to respond to Trustee's motion, in writing. Milledge argued that he had not improperly represented Defendant because he had not received anything, and because the estate recovered funds that Debtor might have recovered. He admitted that he filed a late answer and an improper answer, but argued that he does not believe the filings caused harm in the amount requested by Trustee.

On November 16, 2011, Plaintiff filed "Trustee's Written Submission After Show Cause Hearing" (Docket No. 21). The document submitted by Trustee is a motion seeking sanctions in the amount of \$4,472.50. The motion contains the negative notice language required under Bankruptcy Local Rule 9013-1(b), requiring a response within 21 days. The motion is supported by the affidavit of Rhonda Chandler, counsel for Plaintiff.

Chandler's affidavit reflects, inter alia, Plaintiff's service of the complaint; Plaintiff's filing and service of the motion for default judgment and motion to strike; Plaintiff's appearance at the September 27, 2011 status hearing and Milledge's failure to appear; Plaintiff's request to schedule a Rule 26(f) conference, to which Milledge never responded; and

authenticating the time records for Trustee's counsel to support the request for \$4,472.50 in fees. (Docket No. 21).

The time to respond to Trustee's motion has expired. Neither Defendant nor Milledge has filed a response to Trustee's motion.

Conclusions of Law

There are two predicates in the rules for imposition of sanctions in the instant case: Bankruptcy Rule 9011, and Rule 16(f) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7016.

Under Bankruptcy Rule 9011(b), by presenting to the court a pleading, an attorney represents that:

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Bankruptcy Rule 9011(b).

A motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. Cadle Co. v. Pratt, 524 F.3d 580 (5th Cir. 2008).

In the instant case, the denials of several of the factual contentions in Defendant's original answer were not warranted, and Milledge knew or should have known they were not warranted. They appear either to have been presented for the improper purposes of causing unnecessary delay or needless increase in the cost of the instant adversary proceeding, or to have been the result of inattention or incompetence on the part of Milledge.

However, on October 3, 2011, Defendant filed an amended answer, correcting the grounds set forth in the motion for sanctions. Thus, sanctions are not available under Bankruptcy Rule 9011.

Rule 16(f) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7016, provides:

(f) Sanctions

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate -- or does not participate in good faith -- in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) **Imposing Fees and Costs.** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses -- including attorney's fees -- incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Rule 16(f), Fed. R. Civ. P.

In the instant case, Milledge failed to appear at the status conference on September 27, 2011. Thus, the court must order Milledge to pay the reasonable expenses incurred because of his failure to appear. Those expenses include the preparation of Plaintiff's counsel for the status conference (1.5 hours), preparation for (1.2 hours) and attendance at (1.3 hours) the hearing on this court's Order to Show Cause, and preparation of Trustee's motion (1.4 hours). The reasonable expenses incurred for Milledge's failure to appear at the status conference total \$1,890.00.²

The purposes of the status conference, under Rule 16(a) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7016, include to expedite disposition of the

²This amount represents 5.4 hours at Trustee's counsel's rate of \$350 per hour.

action, and to discourage wasteful pretrial activities. Rule 16(a), Fed. R. Civ. P.

Rule 26(f) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7026, requires that the parties confer, at least 21 days before a scheduling conference, and attempt in good faith to agree on a discovery plan. Rule 26(f), Fed. R. Civ. P.

In the instant case, Milledge's failure to appear caused additional wasteful pretrial activities. The court addressed Plaintiff's motions for default judgment and to strike the original answer without the benefit of Milledge's participation.³ Moreover, Milledge did not participate in formulation of a discovery plan in this adversary proceeding, thus occasioning further delay and increase in expenses. The court concludes that, as an additional sanction, Milledge should pay the fees incurred by Plaintiff in preparing the motion for default judgment (3.3 hours) and preparing the motion to strike (3.6 hours). A reasonable additional sanction for this part of

³The court notes that the motions were denied primarily because granting either one, despite the procedural errors of Milledge, would have deprived Debtor of a discharge without an opportunity for defense. The court determined not to hold Milledge's failings against his client in this instance, given the high stakes involved.

Milledge's failure to properly represent the Defendant in this adversary proceeding is \$2,415.00.⁴

Based on the foregoing, a separate Judgment will be entered ordering Milledge to pay \$4,305.00 to the estate as a sanction, pursuant to Rule 16(f) of the Federal Rules of Civil Procedure, as made applicable by Bankruptcy Rule 7016.

Signed at Houston, Texas on December 27, 2011.



LETITIA Z. PAUL
UNITED STATES BANKRUPTCY JUDGE

⁴This amount represents 6.9 hours at Trustee's counsel's rate of \$350 per hour.